Supreme Court, U. S.
FILED
JUN 28 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1979

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NO. 79-18

******

JAMES EUGENE AVERY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

******

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

******

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The Petitioner JAMES EUGENE AVERY respectfully prays that a writ of certiorari

issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 28, 1979.

OPINION BELOW

The opinion of the Court of Appeals appears in the Appendix hereto. No opinion was rendered by the District Court for the Northern District of Texas, Dallas Division.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 13, 1979. A timely Petition for Rehearing was denied on May 29, 1979, and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED:

Whether the Fifth and Sixth Amendment rights to due process of law and a fair and impartial jury trial are violated by substantial prejudice generated against the Petitioner in a joint trial which resulted in his conviction.

STATEMENT OF THE CASE

Petitioner JAMES EUGENE AVERY was indicted and charged with having committed a violation of Title 18, United States Code, Sections 1955 and 2, allegedly participating as one of the jurisdictional five in an illegal gambling business.

Trial was had before a jury commencing on November 28, 1977 in United States District Court in Dallas, Texas before the Honorable Robert M. Hill, United States District Judge. The Trial Judge had previously overruled the pre-trial motion of the Petitioner JAMES EUGENE AVERY asking for a severance and separate trial. The Government was required to prove that the Appellant, although a resident of Amarillo, Texas, some 360 miles north and west of the Dallas-Fort Worth area, actually was a participant in the conduct of the Dallas bookmaking operation by proving to the jury's satisfaction that he was one of the jurisdictional five participating in an illegal gambling business operated by Co-Defendant WOOD.

The Government alleged that WOOD was the central figure in the bookmaking

operation and that all of the other Co-Defendants, including Petitioner herein, were participating in the illegal gambling business of Co-Defendant WOOD.

The Government's evidence consisted primarily of intercepted telephone conversations and inferences, conclusions and opinions of FBI Agent Cross attempting to evaluate these intercepted telephone conversations.

The Government's evidence reflected that WOOD conveyed line information to Petitioner AVERY and accepted bets from him. The Appellant AVERY contended that he was no more than a mere bettor, and that he should be excluded from the jurisdictional five required by Title 18, Section 1955.

Commencing with the voir dire examination of the jury and concluding with the closing argument to the jury, the Petitioner participated in making more than 42 objections of which 19 were sustained, 18 were overruled and 5 resulted in no ruling, i.e., rephrased or restated by the Court. In addition to the 42 objections made on behalf of the Appellants during the trial, the Appellants urged 16 Motions for mistrial and 16 Motions for severance.

After the evidence was closed, an additional 2 objections were made.

The Trial Court in overruling the Motion for Judgment of Acquittal characterized the evidence against the Petitioner as a "close case." The Fifth Circuit Court of Appeals in affirming the conviction reviewed the evidence as being a "close issue."

The overall thrust of the objections and motions was to call the Court's attention to the fact that AVERY was being denied a fair and impartial trial as guaranteed to him by the Sixth Amendment of the Constitution. The combination of the joint trial and the misconduct and prejudice which occurred during the trial effectively deprived this Petitioner of a fair and impartial jury trial, of his right against self-incrimination, of his right of confrontation and cross-examination, of his right to be effectively represented by counsel, and of his right to be only convicted by proof beyond a reasonable doubt.

As a result of the substantial prejudice which occurred during the trial, the Petitioner AVERY was convicted by a jury. The Court of Appeals for the Fifth Circuit affirmed, and Petitioner

requests the Supreme Court to grant a writ of certiorari in this case.

REASONS FOR GRANTING THE WRIT

Amendment five to the Constitution sets out, in part, the following:

> "...nor shall be compelled in any criminal case to be a witness against him, nor be deprived of life, liberty or property, without due process of law;...."

Amendment six to the Constitution sets out, in part, the following:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed,...; to be confronted with the witnesses against him;..., and to have the assistance of counsel for his defense."

The Supreme Court of the United States has on any number of occasions upheld the

validity of these rights when they were severely prejudiced.

> The right to a jury trial is "fundamental to the American system of justice." Duncan v. Louisiana, 391 U.S. 145 (1968).
>
> Indeed, within the right to a jury trial are included the rights to remain silent, Malloy v. Hogan, 378 U.S. 1 (1964); the right of confrontation and cross-examination, Pointer v. Texas, 480 U.S. 300 (1965); to be effectively represented by counsel, Gideon v. Wainwright, 372 U.S. 335 (1963), and to be convicted only by proof beyond a reasonable doubt, In Re: Winship, 397 U.S. 358 (1970).

The Appellant's "close case" and "close issue" of guilt or innocence was to have been decided in an atmosphere of "presumption of innocence." The substantial prejudice that was generated by the joint trial with the Co-Defendant WOOD was colored by the spill-over effect of evidence which otherwise would not have been admissible.

There are numerous examples of prejudicial inflammatory and imperoper evidence which reached the jury as a result of the joint trial. The Trial Court recognized the closeness of the issues and the Fifth Circuit, although affirming the opinion, again reiterated the closeness of the issues involved in weighing the evidence against the Petitioner. However, despite the unanimous declaration of the closeness of the issue, both the Trial Court and the Appellant Court have side-stepped the issue by stating that there was no compelling prejudice evident against the Petitioner. Petitioner claims as the question presents to this Court that severe prejudice must be assumed in a close case.

The denial of the Petitioner's repeated Motions for mistrial and severance effectively deprived him of a fair and impartial trial and substantially infringed his Sixth Amendment rights. The Fifth Amendment guarantee of due process has been severely and sorely strained by the prejudicial atmosphere generated by the conduct of the Co-Defendant's counsel. Petitioner has prepared a summary of the trial record which reflects the page numbers in the

trial record and the brief summary of the prejudicial matters injected therein, and they are attached hereto as Appendix B.

The question thus presented is whecher or not a trial in such a prejudicial atmosphere lives up to Fifth and Sixth Amendment standards. This Court has frequently recognized that the circumstances of a criminal trial or of the conduct of other parties to a trial may deprive an individual of his constitutional right to a fair trial, e.g. Miller v. Pate, 386 U.S. 1 (1967); Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Tanner v. Louisiana, 339 U.S. 466 (1965); Brady v. Maryland, 373 U.S. 83 (1963).

An examination of the above cases reflects a continuing viability of the recognition of denial of Fifth and Sixth Amendment rights regardless of the source of the prejudice. However, the Fifth Circuit attempts to side-step the prejudice in this case by assuming that the counsel for the Co-Defendant's conduct was beneficial to all. This is a complete misunderstanding of the positions of the parties. The Petitioner filed and urged his request for a severance prior to the trial. He objected at all

times during the trial and reurged his Motions. To say or conclude that the prejudice was part of this Petitioner's trial tactics is inconsistent with the record and the facts.

This Court has long recognized that a trial may so descend into prejudicial irrelevance or may so be infected by inflammatory discourse as to destroy the atmosphere necessary for a fair and impartial jury trial. Berger v. U.S., 295 U.S. 78 (1935); Sheppard v. Maxwell, supra; Estes v. Texas, supra.

However, the Trial Court has the sole responsibility and duty of zealously guaranteeing the constitutional guarantees, and he has a continuing duty at all stages of the trial to grant a severance, if prejudice does appear. Schaeffer v. U.S., 362 U.S. 511 (1960).

In retrospect, the Trial Court must have felt compelled by the economic necessity and pressures of his docket to continue the trial after he had lost control and after it deteriorated to the point necessitating continuous and running objections. The trial deteriorated to the extent that after so many re-

peated objections and rulings thereon that the jury must have considered that Defendant's counsel was so ineffective that he was merely waiving the air with his words. The Fifth Circuit attempts to side-step the repeated objections and the repeated Motions for mistrial and severance by pointing out one occasion where no objection was made.

A careful reading of the trial record reflects that the Court's offer was at most a sarcastic request. To have made any more objections than what the record indicates and to have disrupted the trial any more than what took place would have rendered any type of assistance by counsel completely ineffective. At best, the jury must wonder why a counsel who makes objections and gets sustained 19 times in the course of one trial still does not get his mistrial that he has requested. His effectiveness must have been damaged by the conduct of the Trial Court.

Neither necessary convenience nor expense should ever be sufficient grounds for denying a Defendant a fair and impartial trial. Kotteakos v. U.S., 328 U.S. 750 (1946).

This question must be answered because there appears to be a major conflict between the decisions of the Fifth Circuit in this case, the Ninth Circuit and the D. C. Circuit.

The opinion of the Fifth Circuit in denying the claim for prejudice seem to rely on the fact that the prejudice was created or caused by Co-Defendant WOOD's counsel. The effect of their decision is contrary to the decision of the Ninth Circuit in the case of U.S. v. Lape, 413 U.S. 816 (9th Cir. 1969) which recognized that the prejudice may result from the conduct of the counsel for one of the Co-Defendants. There is an additional conflict with the D. C. Circuit which recognized that the absence of the Defendant's own chosen counsel may result in compelling prejudice. U.S. v. Mardian, 546 Fed.2d 973 (D.C. Cir. 1976).

The Fifth Circuit opinion states that Appellants have a heavy burden to show that prejudice resulted from the trial and affirmed the conviction by holding that no abuse of discretion was admitted in the trial for mistrial and severance.

However, the opinion overlooks the fact that Petitioner contended that the

evidence was insufficient to link him geographically, factually or technically to the Dallas gambling business by the Co-Defendant WOOD. The evidence reflected that WOODs supplied AVERY with line information and that AVERY wagered with WOODs. The Government's contention is that these wagers were "lay off bets." There is a complete factual void of any direct evidence that these wagers were lay off bets.

The factual deficiency is supplied by an opinion offered by FBI agent Cross that it was a lay off bet because he had an opinion that AVERY was a bookmaker and that all bets between bookmakers were lay off bets whether they were in truth or fact lay off bets. Thus, the missing link was supplied by an opinion which was received in a trial infected with substantial prejudice as set out above. In such a climate, Petitioner contends there was no possible way that he could be fairly judged.

This Sixth Amendment right to a fair and impartial trial, coupled with the Fifth Amendment right of due process guarantees that the Defendant's requested instructions will present the evidence

to the jury in such a manner that they will be able to factually determine those issues of fact which are before them for their consideration. Petitioner requested jury instructions which would have placed before the jury the determination of the disputed fact issues, i.e., whether or not the said AVERY was or was not a bookmaker, whether or not the wagers were or were not lay off bets, whether or not such "wagers" were to be considered as "mere bets" or "conducting the gambling business." The failure to give such requested charges further limited the Defendant's submission of his factual issues to the jury for their consideration.

Viewed in this light, the prejudice which was generated during the conduct of the trial takes on added significance. The Fifth Circuit, in their opinion, concluded that AVERY was indeed a bookmaker. Such a conclusion demonstrates the need for the requested instructions, and in view of the climate of prejudice that existed during this joint trial, the need for the requested instructions was materially enhanced. Conversely, the failure to so charge, coupled with the

substantial prejudice serves to effectively demonstrate the violation of the Fifth and Sixth Amendment guarantees.

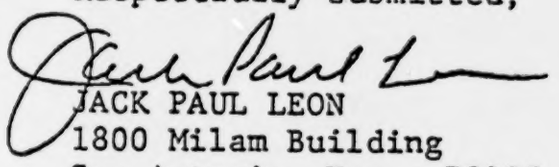
REQUEST FOR CONSOLIDATION

Petitioner has received word that a number of the other Appellants in the case have indicated their desire to file an Application for Writ of Certiorari. If other Appellants do so, this Petitioner requests that he not be joined or consolidated with the Appellant JERRY HENRY WOOD; however, he has no objection to being consolidated for purpose of this writ of certiorari or any other purposes with any of the other Appellants before this Court.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,



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San Antonio, Texas 78205

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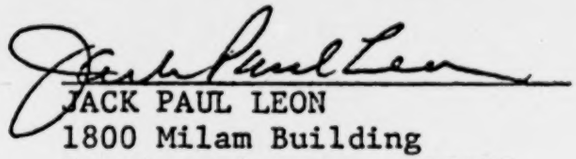
JAMES EUGENE AVERY

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June, A.D. 1979, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to The Solicitor General of the United States, Department of Justice, Washington, D.C., Counsel for Respondent. I further certify that all parties required to be served have been served.



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JAMES EUGENE AVERY

ENTRY OF APPEARANCE

I, JACK PAUL LEON, hereby certify that I am admitted to practice before the Supreme Court of the United States of America, and that I am the attorney of record in all of the lower Courts on behalf of the Petitioner JAMES EUGENE AVERY.

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APPENDIX "B"

Trial Record Page No.	Subject Matter
218	Mr. Avery in business with some notorious criminals in Dallas, Texas
219	Mr. Avery reported to be in business with some notorious criminals in Dallas
320	'Phone records of ring-leader before dates alleged in indictment
323	Other 'phones in Amarillo
374-375	Connection between Avery and Bowers, i.e., associating with notorious criminals
394-396	Wood and Bowers as partners (not within indictment period)
399	Any other partners in the whole world
419	Testimony outside the period of the indictment
503	Any information from a confidential informant that Wood and others in illegal gambling business
535	Ravkind's interpretation of betting sheets
611	Ravkind's offer of all of the transcripts with evidence in the jury's presence
618-622	Investigation of financial condition
645	Persons other than those in indictment
730	Persons within ambit of federal law
734	Amount of dollar volume bets that were handled
735	Comments of Ravkind
738-739	Establishment of innocence
744	Questions of expert which involve an incorrect legal principle

Trial Record Page No.	Subject Matter
751	Prejudicial questions of conduct both anterior and posterior to indictment period
761	Motive of Avery betting with Wood
772-774	Other bookmaker (Junior)
778	Hypothetical questions not based on facts in evidence
782	Reference to a defendant being required to establish his own innocence
784-785	Reference to Las Vegas and Defendant Wood
790	Dealings between bookmakers
792	Concert of purpose as invading the province of the jury
794	Questions to expert
919-920	Other bookmaker (Mike)
929	Jury findings in another unrelated criminal case

Trial Record Page No.	Subject Matter
976	Attempted stipulation as to line source of Wood
1032	Other investigations of Bowers and Wood
1060	Reference that Junior had been picked up in Dallas raid
1167-1169	Reference in question that Avery is a bookmaker
1170	Avery as a bookmaker
1171	Admissions of Ravkind before jury as to conclusions of expert
1183	Opinion about significance or relevance of conversation of Wood
1188	Ravkind's stipulations
1247	Situations of gamblers in other cities in United States
1252	Mis-statement of Avery's conduct

Trial Record Page No.	Subject Matter
1264	Question about conversation between Avery and Wood and reference to bookmaker in Dallas being arrested
1288	Ravkind stipulates that juice is collected on every bet
1607	Reference to Wood as an admitted criminal
1733	Objection to argument of AUSA Badger that Ravkind was shielding Avery

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS
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CLERK

NO. 78-5044

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

THOMAS ANTHONY AVARELLO,
JERRY HENRY WOOD,
CARMEL COSMO BOWERS,
JAMES EUGENE AVERY and
BOBBY JOE CHAPMAN,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Texas

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ON PETITIONS FOR REHEARING
(May 29, 1979)

APPENDIX "C"

Before INGRAHAM, GEE and FAY, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed on behalf of appellants AVARELLO, WOOD, BOWERS, AVERY and CHAPMAN in the above entitled and numbered cause be and the same are hereby denied.

ENTERED FOR THE COURT:

/s/ Thomas Gee Gibbs
United States Circuit Judge